was awarded a further $1,380 for 23 months at the rate of $60 per month, as compensation for partial disablement.

In respect of general damages, the sum of $7,500 was split under two main heads: $5,500 for pain and suffering and $2,000 for loss of future earnings. Judgment herein was given on January 2, 1969. By way of contrast, in an unreported case, *Sah Imm v. Utam Singh Omnibus Co. Ltd.*,[1] decided by the same judge on January 30, 1969, a married woman, 69 years old at the date of the accident, had been awarded $7,500 general damages for a fracture of the right femur causing a 2½ inch shortening of the right leg, limitation of flexion of the right knee joint and wasting of the leg muscles.

The test which an appellate court has to apply in cases of appeal against quantum is that which Winn L.J. has expressed in vivid and meaningful language: "Good gracious me, is this clearly wrong?": see *Watson v. Powles.*[2] In more prosaic terms: "Is this a wholly erroneous estimate?" We have been referred by counsel on both sides to a number of awards in various courts, but, as the Privy Council judgment in *Jag Singh v. Toong Fong Omnibus Co. Ltd.*[3] emphasised:—

> "Caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in the main essentials the facts in one case bear comparison with the facts of another before any comparison between the awards in the respective cases can fairly or profitably be made."

Nevertheless, the two awards by the same judge in one month invite comparison. For the old woman of 69 there was no loss of future earnings. In the case of the appellant who is 56, the evidence shows that his earning capacity as a cook remains unaffected, but the learned judge allowed $2,000 on the basis that "given only two or three years expectation of working life I thought it reasonable to award for loss of earnings at the rate of $60 per month based on three years expectation of working life. In doing so, I have taken into account future contingencies, e.g. the uncertainty of employment and the improbability of a steady income". On this point of comparison, I have found valuable guidance in the judgment of Diplock L.J. who said in *Fletcher v. Autocar & Transporters, Ltd.*[4]:—

> "I think that the result of the decisions in these cases is that the standard of comparison which the law applies, if it is not wholly instinctive and incommunicable, is based, apart from pain and suffering, on the degree of deprivation — that is, the extent to which the victim is unable to do those things which, but for the injury, he would have been able to do."

Since this appellant suffered no deprivation as a result of impairment of his earning capacity in his chosen occupation, it seems to me quite fair to aggregate the two items of general damages, which he was awarded, for purposes of comparison with the award of a similar sum of $7,500 to the woman who was 13 years older. The award to the woman was on the high side, in the view of this court, and should not be regarded as a norm. There was probably little difference in the extent of pain and suffering endured in both cases. Yet two persons were given identical awards whose expectation of life must be different by some 10 years (a woman lives longer, according to actuarial tables), on the ground that the levelling factor was his expectation of a *working life*. With respect, I think herein lies the error, which was an error of principle. In point of fact, a cook is no less fit for work at 70 than at 60 — if he lives that long. For this reason I would allow the appeal and increase the award of general damages from $7,500 to $10,000, having regard to loss of amenities and physical disablement for the rest of his life.

Gill and Ali F.JJ. concurred.

Appeal allowed.

Solicitors: *Murphy & Dunbar; Morris Edgar & Co.*

YEW YOU & ANOR. v. MAH POAY KOH & ANOR.

[F.C. (Ong Hock Thye C.J. (Malaya), Gill & Ali F.JJ.) September 10, 1969]

[Ipoh — Federal Court Civil Appeal No. X.17 of 1969]

Negligence — Claim for damages — Case decided on onus — Onus on plaintiffs of proving negligence — Balance of probabilities.

In this case the learned trial judge had dismissed the claim of the appellants for damages under sections 7 and 8 of the Civil Law Ordinance, 1956, arising from a collision between a motor-cycle and a lorry as a result of which the motor-cyclist was killed. The trial judge held that the appellants had failed to discharge the onus of proving the lorry driver's negligence.

Held, allowing the appeal: (1) the question of onus only becomes relevant when the evidence on both sides is so evenly balanced that the question becomes relevant to turn the scales in favour of one or the other;

(2) in this case the circumstances of the case showed that the lorry driver was negligent and also negatived contributory negligence on the part of the motor-cyclist and therefore the appeal must be allowed and judgment given for the appellants.

Case referred to:—

(1) *Lim Soh Meng* v. *Krishnan* [1967] 1 M.L.J. 8.

FEDERAL COURT

A. Mahendran for the appellants.

P.P. Dharmananda for the respondents.

Cur. Adv. Vult.

Ong Hock Thye C.J. (Malaya): On June 5, 1964 at a bend of the Kampar-Degong road, 1½ miles from Kampar, a 19 year old motor-cyclist fell off his machine to his death after collision with a 5 ton motor-lorry. Both vehicles were travelling towards Kampar.

A claim for damages under sections 7 and 8 of the Civil Law Ordinance 1956 brought by the deceased's parents against the owner and driver of the lorry was dismissed by the High Court at Ipoh. This is an appeal by the plaintiffs against such decision.

As may be expected under the circumstances, only the defendants' version of the accident was presented to the court. Several months after the event the plaintiffs were put in touch, purely by chance, with a supposed eye-witness, whom they called to their aid, but as he admitted that he had not observed how the accident happened and was unable to assist the court in that respect, his evidence was, quite rightly, disregarded by the trial judge.

In the result, the plaintiffs had to rest their case mainly on the evidence of Chief Inspector Syed Ahmad, the investigating officer, who came on the scene at 4.30 p.m., two hours after the accident, and was able to testify to his examination of both vehicles for evidence of collision, produce photographs taken then and there and the sketch plan made by him on the spot, with explanations of what he saw. The police, themselves, had been unable to trace any eye-witness.

The defendants' evidence, however, did not prevail with the trial judge. The driver and attendant of the lorry had related exactly how the accident happened. There were thus irrevocably committed to their version of the story, which was as follows. According to the driver, he was driving his empty lorry at a speed below 30 miles an hour and keeping about 1 foot from the nearside edge of the road when the accident occurred at a right-hand bend. He was then passing an elderly cyclist coming from the opposite direction when he heard a "bang" and, immediately turning his head to look back, he saw a human figure falling under the lorry, followed by a sensation of the rear offside wheel going over some object. He pulled up and saw a body lying diagonally across the white centre line of the road, the head and top torso being over the left of the line, on the same side of the road as the lorry. At no time, he averred, had he gone over the centre line. He saw also the elderly cyclist, who had fallen off his bicycle, in a sitting position near the edge of the road, 8 to 9 feet away from the body. He took no notice or particulars of the cyclist, who got up and rode away. Unable to get other transport to remove the injured man to hospital, he conveyed him there in his lorry. Corroborative evidence was given by the lorry attendant, positioned behind the driver's cabin, who stated that, on seeing the bicycle and motor-cycle approaching from opposite directions, he signalled to the motor-cyclist, but the latter came up alongside and ran into the bicycle, then falling under the lorry. Of this evidence the trial judge said: "I do not accept *in toto* the defence version of the accident and neither do I accept the plaintiffs' version". In one sense this may be taken to mean that he accepted a part of the defence story, though without clarifying what it was. It therefore behoves this court to analyse what he meant or must have meant. This, however, at least, is clear — that, in his view, it was not the alleged collision between the bicycle and motor-cycle which caused the deceased to fall beneath the lorry. Had he thought this explanation to be true, or reasonable and probable, the claim should have been promptly dismissed, simply and unequivocally on that ground. But he did not.

Instead, he cited *Lim Soh Meng v. Krishnan*,[1] a decision of this court, as laying down that "if the court does not believe the witnesses for the plaintiffs or for the defence, then the court must find in favour of the defence". Expressing disbelief of the evidence on both sides, as above quoted, he went on: "It is an established principle of law that in a running-down case it is the primary duty of the plaintiff to establish negligence on the part of the defendant. But having regard to the evidence adduced at the trial on behalf of the plaintiffs *I am of opinion that they have failed to do so.* In the event this action is dismissed with costs".

It is thus plain that the plaintiffs failed, not by reason of the defence, but because, in the opinion of the judge, the plaintiffs themselves had not discharged the onus of proving the lorry driver's negligence. This situation can only arise, as I explained in *Lim Soh Meng's* case, where the evidence on both sides is so evenly balanced that the question of onus becomes relevant to turn the scales in favour of one or the other; but not otherwise. I think there is a distinction with a difference between the conclusions of fact in that case and this, if it can be shown that there was some preponderance of evidence or balance of probability on one side.

Here, when the expression used by the judge ("I do not accept *in toto* the defence version of the accident") is construed in its context, I take it to mean that he disbelieved the defence story entirely. By itself, the meaning of the expression may otherwise seem ambiguous and equivocal. In its context, how-

ever, there is no ambiguity, since the judge has clearly stated that he came to his decision on the ground that the plaintiffs were unable to prove negligence — not that he decided in the defendants' favour on balance of probabilities.

Such being the case, it remains to be considered whether or not any case of negligence on the part of the lorry driver had been made out. As I have said earlier, the defendants had committed themselves to their story, which was held to be false. There is no point in speculating on any other explanation, however plausible, which the defence might have been able to offer. That course is no longer open to them. It is elementary law that the onus on the plaintiffs is satisfactorily discharged once it appears to the court on balance of probabilities that the circumstances are more consistent than not with the defendants' negligence. Evidence in support of the plaintiffs' case is not necessarily confined to what is adduced on their behalf, but the whole of the evidence, from whatever source, must also be taken into consideration.

In my view, accordingly, the mere fact that the evidence of the alleged eye-witness proved worthless is far from conclusive against the plaintiffs. In the nature of things the plaintiffs were compelled to rely mainly on the mute testimony of the sketch plan and photographs, together with the observations of the investigating officer as the foundation of their case. They could also avail themselves of admissions by the defence. A fact, not to be lost sight of, is that only the self-serving evidence of the lorry driver and his mate tells us where the injured man was lying on the road before they removed him. There were no eye-witnesses. The possibility, therefore, cannot be ruled out that, if the lorry driver was at fault, his foremost concern would be to do what he could to exculpate himself. The evidence presented by the defendants ought, therefore, to be scrutinised carefully, if not with some suspicion, since they had no fear of contradiction by a dead man.

In reviewing the evidence certain salient facts raise questions which must be answered or explained. The road at the bend is 19 feet wide and the breadth of the lorry 7 feet 6 inches. If the lorry driver's evidence was true that the "top half of the body" of the injured man "was on the left-hand side of the white centre line", even diagonally, it seems incredible that this lorry travelling one foot from the nearside edge of the road and one foot from the centre line could have failed to run over and crush the head. The sensation he described was plainly untrue. There were no injuries observed which could have been made by the wheels. Indeed the man apparently was still alive, since the driver's intention was to remove him to the hospital. The injuries, observed by the inspector, were "bleeding from the head, nose and ears".

In this connection I think the position of the blood-marks observed on the road by the police officer is significant. In photograph No. 6 the "U" chalked on the road indicated the area over which traces of blood were seen. On the right side of the road facing Kampar there were "lines of blood towards the edge", at the nearest point about 2 feet from that edge, although the main pool of stagnant blood was near the white centre line. This would appear to indicate that the head, source of the bleeding, was at sometime or other 2 feet from the right edge of the road, but it was moved to or from the spot near the white line, before the injured man was placed on the lorry. The question is whether the head was moved from the middle to the side of the road or *vice versa*. In my opinion the logical and only answer is the latter. From the middle of the road the body was lifted and deposited on the lorry for transport to the hospital. This lorry, bound for Kampar, must have remained at all times on its own side of the road, whether or not it was reversed to pick up this load. The photograph showing the body on the lorry also showed that its head was on the left side. Consequently there is no explanation for the blood dripping 2 feet from the right edge of the road unless this was the spot where the motor-cyclist fell, from which he was then moved, in the direction indicated by the lines of blood, to the centre of the road. There he had to be left for some time, while the lorry driver tried unsuccessfully to stop other vehicles to remove the injured man to hospital. More blood, therefore, must have oozed on to this spot because the head rested there longer.

Next, there is the significant connection between the accident occurring at the bend, a *right* hand bend, and the fact that, on his own admission, the lorry driver before the event was wholly unaware, by sight or hearing, of the motor-cycle following him. In the circumstances, seeing a clear road ahead, and unaware of any vehicle behind, it was natural and highly probable that the lorry driver saw no harm in cutting the corner at the bend by going over the white centre line. Assuming this to have happened — just when the motor-cyclist was about to overtake — I think the conditions were just ripe for the type of accident that happened that afternoon. Were this heavy lorry to negotiate the bend by moving a little way to travel along the crown of the road, instead of hugging the nearside, the unexpected manoeuvre could very well have taken the motor-cyclist by

surprise as well as leaving him little clearance to go through.

As against this hypothesis, one has only to consider whether the defendants' tale was true or false. It was dismissed by the trial judge and, speaking for myself, I consider it a cock-and-bull story. Given half of the roadway, I cannot imagine how both the cyclist and motor-cyclist could have proved such incompetent riders, so careless of their own safety, that they could not avoid a collision at that crucial moment on the bend. The photographs show that each must have had a clear view of the other from both sides of the bend.

Finally I turn to the case as pleaded by the plaintiffs. The particulars of negligence contained *inter alia* the following allegations:—

(b) that the lorry driver failed to give way to the motor-cycle to overtake;

(c) that he failed to keep a proper lookout;

(d) that he drove the motor-lorry and knocked into the deceased while he was riding his motor-cycle on the proper side of the road.

Here I pause to observe that the motor-cycle should properly overtake on the offside of the lorry, exactly as the defence witnesses said it did. Hence paragraph (b) should have applied. With regard to paragraph (d) of the particulars, it appears to me that the learned judge misdirected himself, for in his judgment he referred to this paragraph as follows:—

"Under paragraph (b) they allege that the second defendant failed to give way to the motor-cycle to overtake and in paragraph (d) they allege that the second defendant drove the motor-lorry and knocked into the said deceased *from behind* while he was riding his motor-cycle on the proper side of the road."

Apart from the evidence of the chance witness, which counted for nothing, there was no suggestion whatever by the plaintiffs, who had no personal knowledge of the accident, that the lorry ran into the motor-cycle *from behind*. With respect, I do not think paragraph (d) could or should have been interpreted in that light. The learned judge, indeed, was of opinion that the collision could not have happened in this manner and I agree. Dismissing this hypothesis he went on:—

"Assuming that the scratch mark found on the outer tyre of the rear offside wheel of the lorry was caused as a result of the collision between the lorry and the motor-cycle *it would also in my view indicate that the accident occurred while the motor-cycle was overtaking the lorry.*"

This is also the view I share as to the cause of the accident. But how did the judge come to the conclusion that, assuming the accident to have occurred as envisaged, the plaintiffs failed to prove negligence on the part of the lorry driver? His reasons were as follows:—

"As far as the sketch plan is concerned it shows a long scratch mark on the right half of the road from 'K' to 'L' presumably made by the motor-cycle. It also shows the motor-cycle resting on the right hand side of the road and a pool of blood concentrating at about the centre of the road. From the positions of the pool of blood, scratch mark and motor-cycle seen in the sketch plan it is obvious that the accident must have occurred somewhere near the white line in the centre of the road. In these circumstances, I am of the opinion that the plaintiffs have also failed to establish under paragraph (d) of the particulars of negligence that the accident occurred whilst the motor-cyclist was keeping to his proper side of the road and the lorry knocked into the motor-cycle in the course of overtaking it."

He thus came again to the conclusion that the lorry did not run into the motor-cycle *in the course of overtaking it*, that is to say, from behind.

Unfortunately nothing was said to explain why he discarded the other hypothesis, which he himself had raised — if it was considered at all. With respect, therefore, I think that paragraph (d) had been dismissed for the wrong reasons.

As I explained at length earlier, it was highly probable that the lorry driver moved unexpectedly into the path of the motor-cycle at the bend, as the latter was about to overtake, and this was the direct cause of the accident. This hypothesis was overlooked by the judge, although adumbrated in paragraphs (b), (c) and (d). At the same time it is consistent with the evidence as a whole, not to mention the inference which he himself had drawn from the established facts. The circumstances also would negative contributory negligence on the part of the motor-cyclist. I would accordingly allow the appeal.

Since damages had not been assessed, but all evidence relevant thereto can be found on the record, I do not think any useful purpose can be served by remitting this case back to the trial judge for such purpose. As to special damages, being funeral expenses, the sum claimed was $600 which appears to me reasonable. I would assess the damages under section 8 of the Civil Law Ordinance at $3,000 carrying interest under section 11 of the Ordinance at 6 percent per annum. I would also assess the damages under section 7 at $3,000, but as the appellants are also beneficiaries on the intestacy of the deceased, their loss would have been compensated *pro tanto* by their inheritance under the provisions of the Distribution Ordinance 1958. There will accordingly be judgment for the appellants in the sum of $3,600 with interest from June 5, 1964 and costs, both here and in the court below.

Gill and Ali F.JJ. concurred.

Appeal allowed.

Solicitors: *Mahendran & Co.; Dharmananda & Co.*